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POST-CONFIRMATION TRUST

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;) CIVIL NO. CV03-00385 SOM-LEK
Plaintiff,) (Copyright)
vs.)
HAWAIIAN EXPRESS SERVICE,) DECLARATION OF LEX R. SMITH;
INC., et al.,) EXHIBITS "A" – "P"
Defendants.)
)

DECLARATION OF LEX R. SMITH

I, LEX R. SMITH, under penalty of perjury, state as follows:

1. I am an attorney licensed to practice law before all of the State and Federal Courts in the State of Hawaii and am one of the attorneys representing Defendant POST-CONFIRMATION TRUST for Fleming Companies, Inc. in this case.
2. I also represented the Fleming Companies, Inc. in the matter Berry v. Fleming Companies, Inc., et al., Civil No. 01-00446 SPK LEK (the “2003 Trial”).
3. Attached hereto as Exhibit “A” is a true and correct copy of the End User License Agreement (“EULA”), which was submitted as Exhibit “53” in the 2003 Trial.
4. Attached hereto as Exhibit “B” is a true and correct copy of the memorandum dated November 24, 1999 from Ralph Stussi to Wayne Berry, as submitted as part of Plaintiff’s trial exhibit “33” in the present case.
5. Attached hereto as Exhibit “C” is a true and correct copy of page 124 of the transcript of proceedings in the 2003 Trial, dated February 25, 2003.
6. Attached hereto as Exhibit “D” is a true and correct copy of pages 85-86 of the transcript of proceedings in the 2003 Trial, dated February 27, 2003.
7. Attached hereto as Exhibit “E” is a true and correct copy of pages 100-104 of the transcript of proceedings in the 2003 Trial, dated March 4, 2003.

8. Attached hereto as Exhibit "F" is a true and correct copy of a November 1, 2001 letter from Timothy J. Hogan addressed to myself, as submitted as Plaintiff's Exhibit "137" in the 2003 Trial.

9. Attached hereto as Exhibit "G" is a true and correct copy of pages 2-3 of the transcript of proceedings in the 2003 Trial, dated March 5, 2003.

10. Attached hereto as Exhibit "H" is a true and correct copy of the verdict form from the 2001 Lawsuit.

11. Attached hereto as Exhibit "I" is a true and correct copy of a September 1, 1999 letter from Wayne Berry to Jack Borja, submitted as Exhibit "58" in the 2003 Trial.

I declare under penalty of perjury that the statements made herein are true and correct to the best of my knowledge, information and belief.

DATED: Honolulu, Hawaii, February 28, 2006.



LEX R. SMITH